Lee Mun Tuck v Tan Chin Kah & Anor

HIGH COURT (SINGAPORE) — SUIT NO 2951 OF 1982
CHAO HICK TIN J
28 NOVEMBER 1990

Civil Procedure — Dismissal of action for want of prosecution — Delay by both plaintiff and defendant — Court will not assist either party

On 20 July 1982, the plaintiff commenced an action as administrator of the estate of one Lee Wai Leng, deceased, under the provision of s 8 of the Civil Law Act (Cap 30, 1970 Ed). The action concerned a motor accident that took place on 25 July 1979. The writ and statement of claim were only served on the second defendant on 29 June 1983. The cause papers were never served on the first defendant. The second defendant did not file a defence until 30 May 1990, after she had been served a 24-hour notice to do so. Prior to that on 2 May 1990 the second defendant took out an application to dismiss the action for want of prosecution. This application was dismissed by the assistant registrar and the second defendant appealed.

Held, dismissing the second defendant's appeal:

(1) The fact there there had been inordinate delay on the part of the plaintiff was not in question. However, there was also as much inordinate delay on the part of the second defendant in filing her defence.

(2) The power of the court to dismiss an action for want of prosecution was a very draconian order and would not be lightly made.

(3) Where two parties were guilty of inordinate delay there was no reason why the court should be harsh on one party and not to the other. He who comes to court to complain that the other party was guilty of delay and sought the discretion of the court should not himself be guilty of non-compliance with the rules.

Cases referred to

1 *Allen* v *Sir Alfred McAlpine & Sons* [1968] 1 All ER 543 (folld)
2 *Thorpe* v *Alexander Fork Lift Trucks Ltd* [1975] 3 All ER 579 (distd)

S Rasanathan for the plaintiff.
Ng Kian Fong for the second defendant.

Cur Adv Vult

Chao Hick Tin J: This was an appeal by the second defendant against the decision of the learned assistant registrar dismissing with costs the second defendant's application for this action to be dismissed for want of prosecution. I dismissed the appeal and I now give my reasons.

The plaintiff is the administrator of the estate of one Lee Wai Leng, deceased. Letters of administration were granted to the plaintiff by the subordinate courts on 1 November 1979. The action was brought for the benefit of the deceased's estate under s 8 of the Civil Law Act (Cap 30, 1970 Ed) and for the benefit of the dependants of the deceased under s 12 of the Act.

The action concerns a motor accident which occurred on 25 July 1979. The statement of claim avers that at the relevant time the said Lee Wai Leng was a passenger in motor car EF 7173Y driven by the second defendant, as the servant or agent of her employer, the first defendant, along Braddell Road when the second defendant so negligently drove or controlled the car that she caused it to collide into the rear of a stationary motor bus SBS 1406H.

The writ in this action was filed on 20 July 1982, ie four days before the three-year limitation period expired. It was not served on the second defendant until 29 June 1983. The statement of claim was also served at the same time. The plaintiff was then represented by the firm M/s Ngee Thuang & Hiang Chye. On 17 August 1989, the present solicitors for the plaintiff, M/s Jacob Chacko & Associates filed a notice of change of solicitors. On 14 April 1990, M/s Jacob Chacko & Associates filed a notice of intention to proceed. However, on 2 May 1990 the second defendant filed a summons-in-chambers for an order that the action be dismissed for want of prosecution.

The second defendant entered appearance on the same day the writ was served. However, no defence was filed until 30 May 1990 pursuant to a 24-hour notice given by the present solicitors for the plaintiff, ie a delay of six years and ten months. The solicitors who were acting for the second defendant were the same throughout the entire period. They are still acting for her now.

I ought to state that the writ and the statement of claim have never been served on the person named as the first defendant. In his affidavit filed to resist the application to dismiss the action for want of prosecution, the plaintiff explained that the person named as the first defendant in the writ is wrong. Tan Chin Kah was never the employer of the second defendant. He was the previous owner of the motor car EF 7173Y. Apparently, when the search was made by the plaintiff's previous solicitors with the Registry of Vehicles to determine the owner of EF 7173Y, the sale made by Tan Chin Kah to the employer of the second defendant had not yet been registered.

From the time the writ was served on 29 June 1983 up to the time when the plaintiff gave notice of his intention to proceed, there was a delay of six years and nine months. In his affidavit the plaintiff explained that the delay was entirely the fault of his then solicitors, M/s Ngee Thuang & Hiang Chye. He gave details of the efforts he made to contact the solicitors for the plaintiff without success. It would seem that the firm M/s Ngee Thuang & Hiang Chye ceased to exist sometime in or prior to 1985. It was only on 2 March 1989 after having had no communication at all from the previous solici-

tors that he appointed M/s Jacob Chacko & Associates as his new solicitors to handle the claim. There was no affidavit whatsoever from the plaintiff's previous solicitors to explain this inordinate delay on their part to pursue their client's claim.

The law relating to an application to strike out an action for want of prosecution was stated by Salmon LJ in *Allen* v *Sir Alfred McAlpine & Sons*[1] at p 561, as follows:

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
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> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff — so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
> (iii) that the defendants are likely to be prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

I accept that in the present case the delay on the part of the plaintiff's previous solicitors in proceeding with the case was inordinate. Obviously, in order that such a delay might be excused, it was essential for the plaintiff's solicitors to explain what had happened and to show, if they could, that the delay had not been inordinate or inexcusable. In the absence of such an explanation there would be no basis for the court to exercise its discretion in favour of the plaintiff.

But I must hasten to add that that was not all in relation to the present matter. The fact that there had been inordinate delay on the part of the plaintiff's previous solicitors was not in question. However, there was also as much inordinate delay on the part of the second defendant in filing her defence, which was due 22 days after the writ and the statement of claim were served on her, ie due on 21 July 1983. The facts of the present case are significantly different from all the cases which counsel for the second defendant had cited to me as those are cases where there was inordinate delay on the part of the plaintiff without any corresponding default on the part of the defendant in complying with the rules of court.

Counsel for the second defendant placed tremendous reliance on the remarks of Diplock LJ (as he then was) in *Allen* v *Sir Alfred McAlpine & Sons*[1] where he said (at p 555):

> ... it would be unrealistic to expect the defendant in an ordinary action for damages, particularly in accident cases, to take steps to hasten on for trial an action in which the plaintiff's prospect of success appear at the outset to be good. ... It is thus inherent in an adversary system which relies exclusively on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the event alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issue will not be possible.

I do not think that these remarks of Diplock LJ could appropriately be applied in a situation where a defendant himself is in default and is equally guilty of inordinate delay in complying with the rules of court.

The power of the court to dismiss an action for want of prosecution is a very draconian order and will not be lightly made. I think the following observation of Diplock LJ in the same case (at p 556) is just as pertinent:

> Since the power to dismiss an action for want of prosecution is only exercisable on the application of the defendant, his previous conduct in the action is always relevant. So far as he himself has been responsible for any unnecessary delay, he obviously cannot rely on it. ... For the reasons already mentioned, however, mere non-activity on the part of the defendant *where no procedural step on his part is called for by the rules of the court* is not to be regarded as conduct capable of inducing the plaintiff reasonably to believe that the defendant intends to exercise his right to proceed to trial. (Emphasis added.)

Where two parties, like in the present case, are equally guilty of inordinate delay, I do not see why this court should be more harsh towards one party than the other. In such circumstances, I think the court should not favour any one party and justice would demand that the case be permitted to proceed. He who comes to court to complain that the other party is guilty of delay and seeks the discretion of the court should not himself be guilty of non-compliance with the rules. I am unable to disregard the conduct of the defendant and or her solicitors.

Counsel for the second defendant referred me to the case *Thorpe* v *Alexander Fork Lift Trucks Ltd*[2] in support of the proposition that even if a defendant were guilty of delay in filing the defence, he may nevertheless be entitled to an order to have the action dismissed. Emphasis was placed on the views expressed by Den-

ning MR at p 582. But, if one were to examine *Thorpe*'s case[2] carefully, one would see that while the defendant there did not deliver his defence within the prescribed period, he had asked and was given an extension of time to file his defence. However, instead of filing his defence immediately applied to have the action dismissed for inordinate delay on the part of the plaintiff. That situation is entirely different from our case here where the second defendant's delay in filing the defence was as long as the delay of the plaintiff in taking no further action to prosecute the claim.

In the affidavit filed in support of the application the second defendant had also raised two other points. First, as the writ had not been served on the first defendant, the employer, the action against the employer would be time-barred. That being the case, the second defendant would have no recourse against her employer for any indemnity. She was not covered by any insurance in relation to the accident because the policy did not extend to passenger's liability, such coverage being not required at that time. The second point was that the second defendant would now be barred from bringing in the driver of the bus as a third party to the proceedings.

Both these points were not strenuously pursued by counsel before me. They were only mentioned in passing. It would have been obvious to the second defendant that the person named in the writ as her employer (first defendant) was in fact a mistake. Nobody would know this better than the second defendant herself. In any case, there was no obligation on the plaintiff's part to also sue the employer. If she had wanted an indemnity from her employer, the second defendant could have brought him in as a third party, or even take out a separate action. As regards bringing in the driver of the bus as a third party, that was a course of action entirely at the discretion of the second defendant. It was for her to take out the necessary third party proceedings against the bus driver. If she had not done so, she had only herself to blame; or at least her solicitors were to be blamed.

Lest it be misunderstood, I would stress that I do not for a moment condone inordinate delay on the part of any party in complying with the rules of court or taking the necessary steps to pursue his claim. Any such delay should be met with the appropriate sanction, including the dismissal of the action. I appreciate that in an action where facts are in dispute and where there is delay, memories of witnesses may grow dim or they may die. It may be more difficult to get to the truth. But in a case like the present where both parties are equally at fault, equity would demand that I do not assist either party. They must be left to bear the consequences of their own default.

Accordingly, I affirmed the decision of the assistant registrar and dismissed the appeal of the second defendant.

Appeal dismissed.

Solicitors:

Reported by *Mathavan Devadas*